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In the Supreme Court of the United States

OCTOBER TERM—1919.

No. 413.

THE UNITED STATES OF AMERICA on the relation of Kansas City Southern Railway Company,

Plaintiff-in-Error,

vs.

INTERSTATE COMMERCE COMMISSION

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AS *AMICI CURIAE* ON BEHALF OF NUMEROUS RAILROAD COMPANIES

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Presidents' Conference Committee.

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SUBJECT INDEX.

	PAGE
Statement	1
Argument	2
Point 1. The Valuation Act plainly requires the investigation, ascertainment and report of the Present Costs of Acquisition of Railroad Lands	2
Point 2. Since the language of the Act clearly requires that the Commission ascertain the cost of acquisition, the Commission cannot question the wisdom of Congress, nor can it refuse to perform the duty imposed unless such performance is absolutely impossible	13
Point 3. The Ruling in the *Minnesota Rate Cases*, considered as a Ruling upon a Principle of Constitutional Law, does not affect the duty of the Commission to perform the Act specified in the Valuation Act	15
Point 4. The nature of the problem of ascertaining the present cost of acquisition of railroad lands	34

PAGE

Point 5. The present cost of condemnation and damages or of purchase of railroad lands can be readily and accurately ascertained in accordance with established legal precedents..... 40

CASES AND AUTHORITIES CITED.

	PAGE
Beebe v. Johnson, 19 Wend., 500	15
Cohens v. Virginia, 6 Wheaton, 264	20
County of Blue Earth v. St. P. & S. C. R. R. Co., 28 Minn., 503	48
15 Cyc. 722–3	48
Faulk v. Missouri River & N. W. Ry. Co., 132 N. W., 233 (S. D.)	48
Hare on Contracts, 639	15
Harriman, The, 9 Wall., 172	15
Kansas City Southern Railway Co. (1 Val. Rep. 223)	17
Kansas City Southern Railway Co., 231 U. S., 423	21
Lewis, Eminent Domain (Third Edition)	42, 48
Lincoln v. Commonwealth, 164 Mass., 368, 41 N. E., Rep. 489	42
Minnesota Rate Cases, 230 U. S., 352, 451	10
Northern Pacific Railway Co. v. North American Telegraph Co., 230 Fed., 347	21
R. I. & E. I. Ry. v. Gordon, 184 Ill., 456, 56 N. E., 810	42
Smythe v. Ames, 169 U. S., 466	10
Sutherland on Damages, Paragraph 1083	48
Texas Midland Case, 1 Val. Rep. 53, 54, 1:170	3, 5, 7
U. S. v. Grizzard, 219 U. S., 180, 183, 184	8, 42
Winston-Salem Southbound Ry. Co., 1 Val. Rep. 176	17

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vs.
THE INTERSTATE COMMERCE COMMISSION

BRIEF *AMICI CURIAE*.

Statement

An order having been entered, granting permission to file a brief as *amici curiae*, this brief is filed by counsel on behalf of the Presidents' Conference Committee, an organization of the executives of the railroad companies, representing the ownership of approximately 224,000 miles or 85 per cent. of the railroad mileage of the country.

The Interstate Commerce Commission, in the enforcement of the Act approved March 1, 1913,

amendatory to the Act to Regulate Commerce, and providing for the valuation of the properties of carriers subject to said Act, has declined, in the case of the Kansas City Southern Railway, to ascertain and report the present cost of condemnation and damages or of purchase of the carrier lands of said company, basing its declination upon the ground that it is impossible as matter of law to ascertain and report the present cost of condemnation and damages or of purchase of the carrier lands of any railroad company. The interest of the Presidents' Conference Committee in the pending case arises by virtue of its representation in matters involving the valuation of the properties of the various railroad companies embraced within its organization, and the said committee believing that the conclusions reached by the Interstate Commerce Commission as stated are erroneous, it has sought, through its counsel, permission to file a brief on the question involved, and such permission being granted, this brief is now submitted.

Argument.

Point 1. The Valuation Act plainly requires the investigation, ascertainment and report of the present costs of acquisition of railroad lands.

The duty of the Commission with relation to the execution of the Valuation Act is prescribed by its terms. There is no dispute as to what

the Act prescribes. It requires, in plain and implicit language, the investigation, ascertainment and report of the present cost of acquisition and also the present value of railroad lands. These requirements are found in paragraph "First," in the language: "Said Commission shall ascertain and report in detail as to each piece of property owned or used by the said common carrier for its purposes as a common carrier, * * * the cost of reproduction new, * * *," and paragraph "Second," which applies solely to land, providing that: "Such investigation and report shall state in detail, and separately from improvements, * * * the present value * * * and separately the * * * present cost of condemnation and damages, or of purchase * * *."

The Commission makes no denial of these requirements. It has admitted in its decision in the Texas Midland case, 1 Val. Rep. 54, that the Act requires the investigation, ascertainment and report of the present cost of acquisition of railroad lands. The Commission says (page 54): "* * * the direction in paragraph entitled 'Second' for the ascertainment of the present cost of condemnation and damages, or of purchase, in effect calls for a finding as to the cost of reproduction of these lands."

On page 163, the Commission says: "This, however, is not of much practical importance, for paragraph 'Second' requires the Commission to report, if not the cost of reproduction, at least what amounts to the same thing."

On page 164, the Commission says:

> "The right of way of a carrier is frequently donated, but in so far as the carrier must acquire this by purchase or condemnation the cost generally exceeds the acreage value of the lands taken. This is partly due to the peculiar shape of the piece acquired and partly to other causes. This excess cost to the carrier is a thing of importance in the actual production of its railroad, and the carrier claims that it ought to be given weight in the estimate of reproduction. Evidently this was the fact for which Congress intended to inquire. What did it cost and what would it now cost the carrier to procure its right of way and other operative lands in excess of the market value of such lands by the acre?
>
> If this construction is correct, the Commission is required to report as to the operative lands of a carrier the following facts:
>
> 1. Original cost.
> 2. Present value.
> 3. Cost of procuring right of way in excess of acreage value at the time of dedication to public use.
> 4. Cost of procuring right of way at the present time in excess of present acreage value."

The Commission thus recognizes that the Act requires the ascertainment of the present

cost of acquiring the carrier's lands, and that this cost of acquisition "generally exceeds the acreage value of the lands taken." By "acreage value of the lands taken" it means their value, for example, upon the basis of the value per acre of the 160 acre farm through which the right of way passes, and from which its area is carved. The Commission, refusing to estimate these costs of acquisition in excess of this "acreage value," finds a "present value" which is limited solely to the so-called "acreage value." The refusal of the Commission to find the higher cost of acquisition and its reasons for restricting its investigation to the so-called "acreage value" are explained in detail in the *Texas Midland* decision (1 Val. Rep. 53). In defining the "present value" which it reports for carrier lands, it says:

> "Present value is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier, and multiplying this acreage by a market value determined from the present market value of similar and adjoining lands."

On page 167, it says:

> "Present value as reported by the Commission is *nearly synonymous* with market value. What is done is to ascertain the number of acres of carrier land, to deter-

Italics ours.

> mine the market value of similar land adjoining or in the immediate vicinity *per acre* and to apply that price to the number of acres."

The Commission thereby reports a "value" derived by applying to the acres of land owned by the carrier, a market value determined from the present acreage market value of adjacent and adjoining lands in the sizes and shapes in which those adjoining lands exist and which, by reason of the fact that they are devoted to other than railroad uses, are not similar in size and shape to the lands owned by the railroad. The railroad lands, and particularly rights of way, are peculiar in that there must be a continuity of title in strips of narrow area located with particular reference to conditions of topography and community development. Being devoted to a peculiar use requiring such areas in shapes and sizes dissimilar to those of the lands devoted to ordinary agricultural or industrial purposes, railroad lands cannot be acquired upon the basis of the market value of land in the shapes and sizes usable for such agricultural or industrial purposes. The universal experience of the carriers in the acquisition of their lands demonstrates this fact, and its recognition is found throughout the authorities in which the legal principles underlying the acquisition of such lands are outlined. Not only must the carrier pay for the area which it secures, but additional amounts must be paid for the damages to the adjacent property

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from which the railroad areas of peculiar shapes are taken, due to the injury done to such property both by the severance of the land taken and by the inconvenience and annoyance caused by the operation of trains once the railroad is constructed. The carrier thus acquires not only the title to the area actually taken, but certain rights in the adjoining lands which are analagous to easements, by virtue of which the carrier has the right in the construction and operation of its railroad to damage continuously the adjoining property. The Commission in the excerpt above quoted from the *Texas Midland case* admits these things. The Commission in its decision also says (1 Val. Rep. 1, 170):

> "It cannot be denied that frequently the cost to a railroad of acquiring its right of way with respect to parcels which must be purchased materially exceeds the acreage value of the land taken. Previously to the decision of the Supreme Court in the Minnesota Rate Cases it seems to have been understood by many commissions and valuators that the proper method of determining the present value of the operative lands of a carrier was to inquire what it would cost to acquire those lands upon the basis of present prices. For the purpose of determining the excess of such cost over acreage value many studies were made of pieces of construction where the known cost could be compared with the acreage value, and from these investigations were deduced percentages which

> varied for rural right of way from 150 to 300 per cent., being less in case of city lands."

These excess costs arise from the fact that the carrier acquires not only the acreage actually occupied by his right of way, but in addition must pay amounts for the damages done to the residue of the tract of which the land taken formed a part, thereby securing rights, analogous to easements, over the adjoining property. In *U. S.* vs. *Grizzard*, 219 U. S., 180, 183, 184, the Court said:

> "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from the taking, embracing of course, injury due to the use to which the part appropriated is to be devoted. Thus in Sharp vs. United States, 191 U. S. 341, 353, damage resulting to adjacent but distant parcels was denied because there had been no actual appropriation of any part of such separate parcel, but the principle was conceded as to injury, from the character of the use of that taken, to that untaken of the same tract. Upon this distinction the court said: 'Upon the facts which we have detailed we think the plaintiff in error was not entitled to re-

> cover damages to the land not taken because of the probable use to which the Government would put the land it proposed to take. If the remaining land had been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings. But the Government takes the whole of one tract.' To the same effect see Cooley's Constitutional Limitations, pp. 565-566."

From these facts it clearly appears that railroad lands normally are secured at a cost of acquisition which is in excess of the market value of the land taken; that these costs arise by virtue of established legal precedents pursuant to which the carrier is required to incur them; that the Commission has recognized the fact of the existence of such costs, and that the Act intends to require and does require their reporting, but that the Commission refuses to report them.

The reason for the incorporation of these requirements in the Valuation Act lies in a number of considerations. The Act requires the investigation, ascertainment and report of the *value*, not only of the land, but of all the property of the railroads, and requires in addition a study and report of certain important facts which are relevant to the ques-

tion of value. The value of railroad property is a question of fact. As was stated in the Minnesota Rate Cases (230 U. S. 352): "It is not a matter of formulas, and there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." The Court, in defining the scope of this inquiry as to the facts, quoted the language of *Smythe* vs. *Ames* (169 U. S. 466), which has become a cornerstone of valuation precedent:

> "In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

An examination of the legislative history of the Valuation Act shows the intent of the framers of the bill to require the ascertainment and reporting of all these facts pertaining to value

which were mentioned by the Court, each one of which, among numerous others, is specified in its provisions, and each of which constitutes a prescribed field of inquiry.

One of the facts pertaining to value which is mentioned by the Court in the language above quoted, is the "present as compared with the original cost of construction." The "present cost of construction" must be complete, otherwise it is misleading. Its completeness necessarily requires the inclusion of the present cost of acquiring the carrier lands as well as its other property. Clearly the cost of acquiring those lands is as important as the cost of constructing the roadway and buildings upon them. It cannot be doubted that what would have to be paid today to acquire those lands, in accordance with the present day practises and the experience of the carriers in so doing, and pursuant to the principles of law governing such acquisitions and the amounts payable in such cases, is not only *relevant* to the present value of such lands, but would in the normal case be a predominating and controlling consideration. Clearly such costs would be more controlling than the alleged "acreage value" now determined by the Commission, and which it admits is incomplete in that there are excluded certain items of cost covering elements of value which normally and almost inevitably attend such purchases. The reason is therefore clear why Congress included this important requirement in the Valuation Act. With-

out such evidence, the basis for determining valuation would be essentially defective.

Aside from the necessity of the ascertainment of the cost of acquiring railroad lands with relation to the determination of value, the intent of Congress was obvious also to insure the marshalling of all of the information, statistics and data, in which it was thought there could be found a foundation upon which to rest a scientific regulation of various railroad problems. Information was desired as to what it would cost to produce this property today under modern conditions, thus affording information relative not only to the question of value, but thought to be possibly desirable for such purposes as affording a check of the reasonableness of the carrier's plant accounts, the fairness of capitalization, the adequacy of depreciation annuities, and other kindred matters. The complete present costs of constructing the railroads, as distinguished from a partial estimate of such costs, is essential for such purposes.

Point 2. Since the language of the Act requires that the Commission ascertain the cost of acquisition, the Commission cannot question the wisdom of Congress, nor can it refuse to perform the duty imposed unless such performance is absolutely impossible.

The Valuation Act orders an investigation, ascertainment and report of definitely specified matters. A large part of the Act is a bill of specifications detailing with exactness the facts which are ordered to be investigated, ascertained and reported. Under these circumstances, several propositions would seem to be manifest, and not subject to reasonable question. In the first place, the Commission has no discretion as to whether it shall perform the duties imposed. While judgment may be exercised by it, as the expert agency to whom these duties are delegated, in making its determination within the specified issues, it is not for the Commission to substitute its judgment for that of Congress, and to question the wisdom of Congress in legislating as it did, and as a result of a difference of opinion to refuse to enter the fields of investigation which Congress prescribed. The language of the Act is mandatory. It is the mandate of sovereignty. It is the law of the land and made so by the legislative branch of the government, within the proper exercise of the functions of that branch. It is a direction to an inferior and subordinate agency of the

state, which is itself the mere creature of the state, which exercises its authority only as a result of the certain prescribed and delegated powers and duties which give it life. One of the duties imposed by the sovereign state upon its servant is prescribed by the Act as the determination of a certain specified fact. It is not within the scope of the powers of the Commission to test the wisdom or expediency of that delegation of duty and authority.

In the second place, if from the very nature of things, the duty imposed is impossible, in that it cannot be accomplished by anyone possessing the utmost skill and knowledge, the Commission is excused from the performance of its duty. But in this relation, impossibility is to be distinguished from impracticability or from inadvisability. Questions of expediency, inconvenience or hardships are not relevant to the issue. It matters not how much effort the ascertainment will require, what expenditures are necessary, or what may be done with the results or conclusions once they are derived. If the estimate of the cost of acquisition can in any possibility be made, any considerations going to the hardship or difficulty of making the ascertainment or of the worth of the results when ascertained, are not material to the issue. The Commission's refusal to follow the mandate of the law can only be justified if it is established that in the very nature of things the Commission cannot make the estimate of probable costs of acquisition which the Act requires, which

incapability arises because such costs of acquisition under any method or theory do not lie within the limits of rational determination. This means impossibility of rational determination under every hypothesis consistent with reasonable valuation theory and legal precedent. The following cases are pertinent:

The Harriman, 9 Wall., 172.
Beebe vs. *Johnson*, 19 Wend., 500.
Hare on Contracts, 639.

We contend that it is practicable to ascertain such costs, that they can be reasonably ascertained, and that their ascertainment is necessary to the ascertainment of the value of the railroads and the execution of the Valuation Act.

Point 3. The ruling in the Minnesota Rate Cases considered as a ruling upon a principle of constitutional law does not affect the duty of the Commission to perform the acts specified in the Valuation Act.

Prima facie the conditions which we have heretofore outlined point so clearly to the propriety of compliance by the Commission with the law, that we may with profit next examine the grounds of the Commission's refusal. Its refusal is based primarily upon its interpretatation of the decision of the Court in the *Minnesota Rate Cases*, 230 U. S. 452. This ground is stated by the Commission in its

answer in this proceeding and is the foundation of the decision of the Commission in the *Texas Midland* case. It is the Commission's position that the position of the Court in the *Minnesota Rate Cases* establishes that the ascertainment of the present cost of condemnation and damages or of purchase of railroad lands has no lawful nor rational basis.

In this connection, the fact must not be overlooked that the refusal of the Commission to comply with the Act is *entire*. It declines to report the present cost of acquisition of the railroad lands, even where that ascertainment can be made with complete accuracy. For example, it would seem clear that where the actual acquisition of such property had been so recent that the conditions obtaining at the time of purchase were substantially those of the date of valuation assumed by the Commission in making its report, the "present cost of condemnation and damages or of purchase" would be substantially the same as that original cost. Therefore, the findings required by the Valuation Act could be made accurately and without the exercise of any assumptions. The Commission, however, refuses to make any findings of the cost of acquisition of railroad lands under such circumstances. It is alleged in the amended petition, and the allegation is not denied, that certain lands were acquired by the plaintiff for right of way purposes shortly before the date of valuation through condemnation proceedings, at an actual cost of $180,000, but that the Commission has reported

the so-called "present value" of these lands at $60,000 (Record pages 34, 35).

The Commission thus declines to report the present costs of acquisition. The decision of the Commission in the *Texas Midland Case* and in the cases decided subsequent thereto is absolute and unqualified (*Winston-Salem Southbound Railway Company*, 1 Val. Rep. 187, *Kansas City Southern Railway Company*, 1 Val. Rep. 223). It therefore appears that the position of the Commission, founded upon the decision of the *Minnesota Rate Cases*, assumes that that decision established as a matter of law the impossibility of the ascertainment. In view of the reliance of the Commission upon the doctrine of the *Minnesota Rate Cases*, we may therefore properly direct ourselves to the consideration of the relationship of that decision to the duties of the Commission prescribed by law.

The *Minnesota Rate Cases* did not involve the Valuation Act. They were submitted for decision before the Act was passed. The crux of the issue presented in these cases was the constitutionality of state-made rates, which the carriers asserted were confiscatory in that they did not permit a fair return upon the value of the property devoted to public service. The Court at the beginning of its discussion reiterated the established principle of law that the rates must pay a reasonable compensation upon the fair value of the property devoted to public service. Whether confiscation had been effected by the regulation under attack, depended upon

the relationship of the returns under the prescribed rates to the value of the property used. This was the announcement of a substantive rule of constitutional law. The Court then said that this value was to be determined as a question of fact:

> "In determining whether that right (i. e., the right of receiving 'just compensation') had been denied, each case must rest upon its special facts. * * * The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts." (Page 434.)

The Court, having laid down as a proposition of constitutional law that value was the test, thus defined the issue of fact and considered in detail the testimony regarding the cost of acquisition and "railway value" of the lands in question. The Court said:

> "The constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidated facts must be proved." (Page 452.)

It decided that the necessary facts were not proved. It pointed to certain defects in the proof, and repudiated the value founded upon

this evidentiary basis. At the conclusion of the Court's discussion it uses language which clearly indicates that its consideration is confined solely to the issue of fact. It said:

> "Finding this defect in the proof, it is not necessary to consider the objections which relate to the sources from which the property was derived or its mode of acquisition. * * *" (Page 456.)

Value as a question of fact, was thus passed upon in the light of the evidence submitted, but there is nothing in the opinion indicative of a holding that the present cost of acquisition of the railroad lands in question, properly ascertained, was not relevant to the issue of value.

From these considerations it is entirely clear that the Court did not decide that the test of confiscation, as a question of substantive *law*, is not the value of the carrier lands, based upon a consideration of their estimated cost of acquisition among other relevant facts, provided that this cost was ascertained on other bases than those hypotheses which the Court condemned. It would have been inconsistent with the entire trend of judicial precedents upon this question, and with the opinion of the Court itself, as expressed in the language which we have quoted, for the Court to have prescribed as a rule of *law* that the utility was not entitled to a return upon a value ascertained by a consideration of such relevant facts as an

estimate of the present cost of acquisition, since the principle has been long and firmly established, as the opinion itself states, that the test of confiscation in a case involving rates is value, the determination of which is a question of fact. The error of the Commission lies in the fact that it takes dicta from the discussion of issues of fact and elevates it to the position of a pronouncement of a substantive rule of constitutional law. This alleged substantive rule, that the carrier is entitled to a return only upon the value of its lands determined upon the basis of the acreage value of the adjoining tracts of dissimilar size and shape and without any consideration of the cost of acquisition of the carrier's lands, is inconsistent with the fundamental proposition of constitutional law first announced, to wit: that the carrier is entitled to a return upon the fair value of its property, which, as a question of fact, is to be determined by a consideration, not of any one class of information, but of *all* of the relevant facts.

In the case of *Cohens* vs. *Virginia*, 6 Wheaton, 264, Chief Justice Marshall said:

> "The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court, in the case of Marbury vs. Madison.
>
> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.

> If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.
>
> The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. (Pages 399–400.)

The maxim of the law is so familiar to the courts and lawyers that a statement of it is seldom necessary. Occasionally when lawyers in the zeal of advocacy seek to press too far mere language or dicta the courts allude to this well known rule. For example, see the *Kansas City Southern case,* 231 U. S., 423, where it is said:

> "The expressions quoted were properly employed with respect to the questions then presented for decision." (Page 447.)

Recently the Circuit Court of Appeals of the Eighth Circuit found it necessary to fully restate the rule and apply it. See *Northern Pacific Railway Company* vs. *North American*

Telegraph Company, 230 Fed., 347, where it is said:

> "As the facts upon which the opinions in the cases cited rest are materially different from those in the case at bar, it is indispensable to a just appreciation of these decisions and of the opinions in these cases, and of their bearing upon the crucial question in the case at bar, that in their examination and discussion these familiar rules announced by Chief Justice Marshall be borne constantly in mind." (Page 355.)

The Circuit Court then repeats the language of Chief Justice Marshall in the case of *Cohens* vs. *Virginia*, above quoted.

Even had the Court held in a rate case, as a matter of law, that the cost of acquisition of the carrier lands could not be used to determine their value, is such a holding upon such an issue and in such a case relevant to the duties prescribed by the Act of Congress? The impossibility, because of a declared rule of law in a case involving the issue of confiscation by rate regulation, of using such information in such a case, cannot relieve the Commission from its duties under the mandate of Congress. As heretofore suggested, Congress has ordered the marshalling of a variety of information thought to be desirable as the groundwork for possible methods of solu-

tion of various phases of the railroad problems. Assuming that this erroneous construction of the decision of the Court in the *rate* case in question is proper (which we emphatically deny), it has been urged that there are other and diverse uses of such facts and information in critical lines of inquiry and investigation, aside from that of testing whether rate regulation is confiscatory. The impossibility of the lawful use of such facts in one of various fields of investigation is no justification for refusing to do what Congress ordered done, and which may be useful for other important purposes. The desire of Congress, and its judgment as to the matters regarding which it desires information, is supreme. It is not within the power of the Commission as a servant of the government to substitute its desire or judgment for that of the government. Irrespective of the relevancy of such information in a case involving the issue of confiscation by rate regulation, Congress had the power to require the ascertaining and reporting of such information, or of any other information, which it desired.

An examination of the *Minnesota Rate Cases* discloses that there was properly repudiated a value based upon assumptions which were so inconsistent with law and fact, that the results derived were entirely excessive and unreasonable. But this criticism of the conclusions of fact based upon such assumptions cannot justify the refusal of the Commission to make such estimates based upon assumptions which are consistent with law and fact.

In the first place, it is clear from the language of the opinion as a whole, as we have already suggested, that the consideration of the cost of acquisition of railroad lands in that case was a consideration of the *facts* upon which the finding of value of the court below was based. Having opened its discussion with a statement of the fundamentals upon which it proceeded, by defining the issue of the ascertainment of value as a judgment based upon a proper consideration of all relevant facts, the proof was considered, the opinion stating that "the constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts must be proved." After a critical analysis of the testimony, and because of specified defects in the proof, the Court concluded:

> "By reason of the nature of the estimates, and the points to which testimony was addressed, the amount of the fair value of the company's land cannot be separately determined from the evidence, but it sufficiently appears for the reasons we have stated that the amounts found were largely excessive."

Clearly the estimated cost of acquisition of railroad land is a fact relevant to the determination of its value. The decisions of the courts indicate that in a preponderance of cases, the cost of reproduction of the physical prop-

erty other than land has been recognized as a controlling factor in the determination of value, and the relevancy of such cost is universally recognized. It cannot be seriously contended that this court could have attempted to prescribe any rule for the ascertainment of value, as a question of fact. Its intent to do so was specifically denied when it said:

> "The ascertainment of that value is not controlled by artificial rules. It is not a matter of *formulas*, but there must be a reasonable judgment, having its basis in a proper consideration of *all* relevant facts." (434.)

Clearly, therefore, the Court did not hold that the ascertainment of value could be limited to any certain designated facts. The language above quoted negatives any possible attempt to restrict the scope of consideration to any certain class of information, or to exclude from consideration any facts which are relevant, provided that they are properly established on dependable and logical grounds.

The Court was therefore merely passing upon the questions of fact as those questions were presented by the testimony which had been offered. The general language used in this consideration must be interpreted, having in mind the point to which the Court addressed itself. The methods which were condemned were the methods in issue, and used in that

case. An examination of the decision shows that there is continual reference to the specific testimony which the Court was considering, and that any general observations which the Court made can refer only to the specific problem then under consideration. The present cost of acquisition of lands now owned is an estimate resting on certain assumptions. In the range of the possible assumptions which in the exercise of judgment, might be adopted, the Court of necessity could consider only those which were in issue in the testimony then under consideration.

For example, examination of the opinion discloses (Page 450), that the Court condemned the offered estimate of acquisition costs, in that it rested upon a "supposed compulsory feature of acquisition," and contemplated "that the company would be compelled to pay more than fair market value" and thus would be deprived of its lawful right of the exercise of the powers of eminent domain under the established principles of law controlling that exercise. The Court likewise condemned the assumption used, that the company would be bound to pay an excessive "railway value of its property," and pointed to the fact that this assumption was directly in conflict with the established principles of law, enunciated in condemnation cases and restricting the allowance to the market value. The Court specifically stated (Page 452) that there is no evidence before us from which the amount which would "*properly* be allowable in such condemnation proceedings can be ascertained,"

thereby manifestly implying that had the estimate been based upon correct assumption, and had there appeared what "would properly be allowable in such condemnation proceedings," such market value determined in accordance with legal precedents would have been properly the basis of the fixing of value. Similarly, the Court said (Page 452) that the contemplation of the complete removal of the road and a readjustment of its values because of such obliteration, was "to indulge in mere speculation." So again the Court condemned the assumption that "all the difficulties which might be imagined as incident to such a 'reproduction' were considered," and that the "increase sought for 'railway value' *in these cases* * * * is an increment which cannot be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world." (Pages 453–455.)

Applied to the testimony there under consideration, and the important parts of which were quoted in the Court's opinion, such criticism of the evidence then before the Court was unquestionably fair. But as the basis for the refusal to consider facts based on reasonable and lawful assumptions and resting upon known criterions, not founded in imaginative conjecture, but finding a test and standard in the current and common business transactions of the railroad companies generally in the purchase of lands, it wholly fails.

Specific criticism by the Court of specific testimony cannot foreclose the investigation or ascertainment of facts in that same field of thought, if that investigation or ascertainment is prescribed on the basis other than the one condemned, and avoiding the vice specified. To so hold is to destroy the fundamental proposition announced in the opinion that value is to be derived by a consideration of *all* relevant facts, and makes impossible the formation of a sound judgment since the basis of judgment is not as broad as the subject considered.

In the Commission's decision of this question in the *Texas Midland* decision (page 54) it states the necessity of assumptions and states what these assumptions shall be. In that decision, it erroneously assumes the necessity of the maximum assumptions, and states that the Act in requiring the cost of reproduction of the carrier lands requires the assumption that the property in question "is to be taken as non-existent." It states that it is sophistry to contend that the lands of the railroad can be reproduced "without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the *mental obliteration* of the railroad itself." The Commission then discusses, as decisive of the issue, the language of the *Minnesota Rate Cases*, in which was condemned the use of assumptions based upon inadmissible and speculative hypotheses, as though such hypotheses were the only possible hypotheses, and the Commission repudiates evidence

introduced by the carrier upon the ground that its method was not distinguishable from that condemned in the *Minnesota Rate Cases*. That the Commission kept continually in mind assumptions of the most extreme sort, such as those condemned in the Minnesota Rate Cases, is clear from the following language (page 61): "Not alone do the uncertainties that we have referred to surround what would be the conditions of ownership, of improvement and of value of nearby property and of general industrial development, but there can be no certainty as to what land would have to be acquried at a cost to the carriers upon reproduction or a present acquisition," and the Commission then proceeds to discuss the difficulty of ascertaining what percentage of the carrier's land would be donated to it by communities or individual owners. Then the Commission states its inability to determine with accuracy what conditions would exist if these maximum assumptions were made, which contemplate the entire "mental obliteration" of the railroad itself, and the changed conditions of the ownership of adjoining property, the changed status of the improvement of the property adjoining the railroad and of the community generally, the different value of the nearby property and a new status of the general industrial development of the community, resultant from the complete elimination of the railroad from the community and the removal of its influence upon such general conditions as the conditions of ownership, value, improvement and general

community industrial development. (Texas Midland decision, page 61.) We feel that Congress could not have intended to require the determination of an estimated cost of acquisition based upon any such processes. But can the statement by the Commission of the possible exercise of unreasonable judgment in the making of an estimate effect a nullification of the law requiring it to make such an estimate in the exercise of reasonable judgment?

The Commission in its erroneous interpretation of the opinion of this court in the *Minnesota Rate Cases* has gone so far as to assume that the opinion in that case condemned the cost of reproduction method as applied to lands as being an "impossible hypothesis." In the Brief of the Commission now before the Court it is said, page 10:

> "This Court clearly states, in substance, that the estimate of present cost of condemnation or damages, or of purchase, which appellant is asking the Court to compel the Commission to make, is an estimate which is wholly beyond reach of any process of rational determination. In this connection it points out that the appraisers of the lands involved in the *Minnesota Rate Cases*, in an attempt to estimate the cost of acquiring the lands, were presented with an impossible hypothesis."

This Court in the *Minnesota Rate Cases*, page 453, said:

> "Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right of way was worth."

The hypothesis here referred to was that presented by the specific assumptions upon which the witness proceeded in the specific testimony which the Court then had under consideration. It cannot be assumed that reference could be made to the hypothesis presented by other assumptions, or by assumptions based upon such reasonable and legal grounds, as would avoid the vices which were the basis of the Court's criticism of the specific testimony which it considered.

Careful consideration of the opinion points clearly to the fact, furthermore, that the "impossible hypothesis" to which the Court refers was, in fact, not the determination of the cost of acquisition, but the determination of a "railway value." The Court said on page 452:

> "The cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied, and when the cost of reproducing the property may be ascertained with a proper

> degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

What the opinion condemned as an "impossible hypothesis," was the assumption of the existence of a peculiar railway value which the appraisers sought to determine. The court said of this character of value, that it "must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world."

The opinion, page 445, contains this statement:

> "In the latter part of 1906 the State notified the company to report the value of its properties, requiring a statement in one column of the 'market value' and in another column of the 'value for railway purposes.' Mr. Cooper was instructed to prepare the valuation for this report."

The entire opinion in so far as it relates to land values is devoted to a criticism of the requirement thus made by the State that "value for railway purposes," or "railway value" be reported. This character of value, the court condemned as an "impossible hypothesis."

The reasoning of the Commission that it cannot determine the cost of reproduction of lands because it has no way of ascertaining or fixing the proportion of the railroad lands

which would be donated in a reproduction, finds no support in the opinion of this Court in the *Minnesota Rate Cases*. This Court there declared, page 454:

> "The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

The fundamental inquiry which the Commission is to make under the Valuation Act is as to the value of the property of the railroad, including the value of its lands. In the determination of the "present value" of carrier lands the fact that the carrier originally paid little or nothing for them is of no consequence. It is not the original cost of the lands of which the carrier may not be deprived without due process of law; but it is their value at the time of the deprivation. The estimated present cost of acquiring the lands is one of the elements named for consideration in the determination of their present value, and in the ascertainment of such present cost of acquisition the fact that certain of the lands may have been donated is entirely irrelevant. In paragraph "Second," the Act requires the investigation and report of the "present cost of condemnation and damages or of purchase." This provision contemplates the ascertainment of the cost of acquiring by condemnation or purchase the land in

question. It contemplates this acquisition at a *cost.* It does not contemplate acquisition by donation *free* of cost.

Point 4. The nature of the problem of ascertaining the present cost of acquisition of railroad lands.

The "present cost of condemnation and damages or of purchase" of the lands of the carrier is necessarily an estimate. It is the *present* cost of acquiring something which is already owned, and which cannot, therefore, be actually again acquired. The requirement of ascertaining this cost therefore contemplates a cost under conditions which are contrary to the existing fact, and requires a theoretical ascertainment of the cost of property, the title of which is assumed for purposes of the calculation to be not in the carrier, but in someone else from whom acquisition is to be made. Congress therefore necessarily contemplated the making of assumptions, when it delegated this theoretical task to the Commission. Congress did not designate what the assumptions should be. That determination is delegated to the Commission under the natural expectation that the assumptions will be fixed on a basis so consonant with practical experience that the results derived will afford information of the present cost of establishing these properties and of what the investment under present day conditions would be as compared with the actual or original

investment, thus affording information pertaining not only to the question of value, but desirable for various other purposes contemplated by Congress, and in the determination of which information regarding what investment would be required to establish these properties today, and under present conditions, is desirable.

Necessarily, there is latitude in establishing these assumptions. The subject does not permit of the didactic pronouncement of fixed rules. Valuation is not an exact science. Value and estimated costs lie in zones of reasonableness, and are matters of sound judgment based upon a consideration of the controlling circumstances. The determination, however, is not one of mere conjecture. It is a matter controlled by sound judgment. Congress contemplated that the entire ascertainment should be made in the exercise of such judgment, and with conscientious skill. Estimated costs are of frequent service in the ascertainment of value. Congress could require the making of skilled estimates.

The position of the Commission is not consistent with this broader view of the problem, but is affected by a literal interpretation of certain dicta in the opinion of the *Minnesota Rate Cases*, of which a fetish is made, and which are even quoted almost in verbatim form in its amended answer. The position is based primarily upon the proposition that the assumptions condemned in that opinion are those which it should apply in the exercise of its skilled

judgment, and that the determination of these estimated costs is not possible without the indulgence of that conjectural reasoning which was there properly condemned and upon which condemnation the refusal of the Commission to obey the law is based.

As just stated, within the latitude of the possible assumptions resting in judgment, Congress contemplated that the Commission would exercise sound judgment. The problem being the estimate of the present cost of acquiring what the carrier owns, and therefore, in fact, need not acquire, there is necessitated, at least, the assumption of a changed condition to the extent of the status of title. This would seem to be a minimum of assumption. In the widest range of assumption, as distinguished from this minimum, it would be possible to assume the non-existence of the road, that it has never been built, that the community development which has resulted from its existence has not occurred, that the resultant value now existing in the community could not therefore exist, and that under this mental obliteration of the road, there would be necessary a hypothetical readjustment of the community values, which are now the result of its existence. The Commission assumes the necessity of such speculation, and predicates its refusal upon the impossibility of doing the obviously unreasonable. Need skilled judgment, however, go to this degree?

The error of the position of the Commission is that it recognizes no degrees of reasonableness,

and places all estimates of the cost of acquisition of railroad land on the plane of the estimates which the Court criticised. Where Congress has ordered the reporting of facts in the exercise of reasonable judgment, the Commission now refuses to act because of the fact that the Court, in the criticism of certain testimony, has condemned estimates which were not based upon reasonable judgment. Where the Court criticised certain assumptions in a certain case as unwarranted, the Commission now refuses to enter the field of the investigation involving any assumptions, not on the ground that a reasonable judgment cannot be formed on a minimum assumption, but that to enter such field it must adopt assumptions justified neither by fact nor law, and which for those reasons the Court condemned. This position is plainly fallacious. It is founded upon a misconception of the duties imposed by the Act, the applicability of certain *obiter dicta* to the problem in question, and the scope of judicial precedent.

Among the decisions of courts and commissions may be found language critical of estimates of the cost of reproduction of public utility property other than land. This criticism is directed merely to the facts of the particular case. Fantastic overheads have been included, based on highly theoretical and imaginative conceptions of how the property would be reproduced, and every contingency and difficulty of construction which could possibly be met in the building of the property,

has been included and reflected in excessive costs. The Commission, relying upon the decisions of such courts and commissions in passing upon those issues of fact, might as well refuse to report the cost of reproducing the buildings and other structures of the railroads, as to refuse here to report the cost of acquisition of the railroad lands. Judicial criticism of the proof of the facts relied upon by the parties in litigation involving the issue of the confiscation of property by rate regulation, cannot establish a lawful basis for the refusal of the Commission to ascertain rightly certain facts, when that action is ordered by Congress. If the Commission is justified in refusing to estimate the cost of acquisition of these lands, because it is possible to indulge in unreasonable conjecture and to form erroneous judgments, it may with equal justification refuse to make any estimates, since all estimates involve the use of judgment in the making of the necessary basic assumptions.

The Commission is now engaged in making an estimate of the present cost of reproduction of all of the railroads in the United States, it being assumed that all of these roads would be reproduced between the years 1914 and 1920. When the work is completed, it will purport to show for all of the railroads in the country the cost of reproduction during that period of their property. This estimate is necessarily based upon a foundation of assump-

tions. The assumptions employed by the Commission and the methods of cost ascertainment are explained in the opinion in the Texas Midland case (pages 11, *et seq.*, 108, *et seq.*). But it is not possible for the human mind to grasp the status of the conditions affecting the costs of construction, the price of materials, land values, and the wages of labor, which would exist in this country during those years were all of the railroads of the country to be obliterated during that period and then reconstructed. The business life of the nation would be disorganized. The increase in the demand for materials and labor would place their cost on so high a plane as to make the reconstruction of these properties a financial impossibility, even were their reconstruction a physical possibility (and it is not a physical possibility). The reproduction hypothesis therefore, if applied to a theoretical and logical finality, brings the estimator to problems which are beyond rational determination. This difficulty is avoided by the use of common sense, by approaching the problem in a spirit of scientific inquiry, and by the use of that judgment necessary to make the results of the work of practical weight. The determination of the cost of acquisition of railroad lands is susceptible of a like solution.

Point 5. The present cost of condemnation and damages or of purchase of railroad lands can be readily and accurately ascertained in accordance with established legal precedents.

The problem of the ascertainment of the present cost of acquisition of railroad lands is merely the application of the principles which have become well established by legal precedents governing the rights of the parties in cases involving the acquisition of such property. As stated in an earlier portion of the brief, what Congress has required is an estimate of the cost of obtaining property, the title of which is already held. Assumptions must therefore be made, and the judgment of the Commission must be formed based upon these assumptions, and with a careful statement of them in order that the report will disclose the exact nature of the fact reported. A brief consideration of the nature of the problem and the legal precedents which are applicable to it leads to a conclusion that an estimate of the cost of acquisition of railroad lands can be made with accuracy, with the use of reasonable assumptions which in no way impair the accuracy of the results, and that the law can thus be complied with.

We have heretofore suggested that the cost of securing railroad lands can be resolved into two general elements. The first of these is the acreage value of the area which is actually taken

for railroad purposes. The second is the element of damage to the adjoining lands which the railroad does not take. The former is merely ascertainment of the value of the area of which the owner is deprived. The latter is an ascertainment of the *diminishment* in value of the lands of which the owner retains title and possession. The issue in each instance is an issue of value, the former being the value of the land taken, the latter being the decrease in value of the land not taken. Both of these determinations are of matters which lie in sound judgment based upon a consideration of the facts. Both of these problems are commonly presented to juries in cases which are common in every court of the land. These determinations are made pursuant to the established precedents which protect the owner of property against the taking or the damaging of any part of it. The damages, as the cases heretofore cited disclose, consist usually of those injuries due to the division or separation of the owner's land, and the severance of its parts by virtue of the alienation of title to particular strips desired for the right of way, and in addition, of those injuries arising from the use of the lands taken for railroad operation, and of such character as the annoyance and inconvenience caused by noise and smoke and the hazards which arise from the possibility of injury to property by fire and to person by accident. This law is clearly defined and well

established. The following authorities are in point:

Lewis, Eminent Domain (Third Edition) Chapter XX.
U. S. vs. *Grizzard*, 219 U. S., 180, 183-4.
Lincoln vs. *Commonwealth*, 164 Mass., 368, 41, N. E., Rep. 489.
R. I. & E. I. Ry., vs. *Gordon*, 184 Ill., 456, 56 N. E., 810.

Clearly it cannot be said that any insuperable difficulty is presented by the ascertainment of these items of value and damages as to property which is not yet acquired or which is in the course of acquisition, since that problem is one which is commonly solved by juries in condemnation cases. If there is any proper basis for the refusal of the Commission to make the ascertainment which is thus commonly made by courts and juries, the refusal must proceed from the fact that there is a difference between the problem presented by the ordinary condemnation case and that which arises in the determination of the cost of property which is already acquired. The reason must be that the difference in the conditions existing in the problem which confronts the jury, and the problem which confronts the Commission, as to property now owned by the railroad, presents an insuperable obstruction.

The refusal of the Commission to comply with the Act, is, as has been said, entire. It

declines to report the cost of acquisition of railroad lands in any case. It is clear that in cases where the property has in fact been acquired recently and the lapse of time has produced no conditions making the problem presented by the Act different from that which is presented to the juries, nothing prevents the Commission from forming the same judgment which a jury would form. Thus where the actual acquisition of the property has been so recent that the conditions obtaining at the time of purchase were substantially those at the valuation date assumed by the Commission in making its report, the "present cost of condemnation and damages or of purchase" would be substantially the same as that original cost. Therefore the findings required by the Valuation Act can be made without any assumptions other than that the carrier has not title. The judgment in such an instance does not differ from the judgment which a jury would make without hesitation.

The Commission, however, declines under such circumstances to ascertain the present cost of acquisition. It is alleged in the amended petition, and it is not denied in the Commission's answer, that certain lands were acquired by the plaintiff for right of way purposes shortly before the valuation date, by the means of eminent domain and at an actual cost of $180,000, and that the Commission has reported the so-called "present value" of these lands at $60,000 (Record, pages 34,

35). This "present value," as above explained, is merely the acreage value of the area taken, upon the basis of the acreage value of the adjoining property, and with no consideration of the damages to the adjoining property represented by a difference between this partial cost and the total price required by the law to be paid. It cannot be seriously urged that the Commission in such a case cannot comply with the Act, or that the present value of such lands can justifiably be reported by the Commission as less than would be determined by a jury in such condemnation proceedings, in accordance with the principles of eminent domain which are firmly established as a part of the law of the land. The Commission, by reporting as the "present value" of such property a mere fraction of the cost of securing it, covering only part of the elements of value which attach to the property and for which the carrier under established law was required to pay, by refusing to comply with the terms of the Act which require the reporting of these complete costs and of all elements of value of the lands, has proceeded in clear disregard of the terms of the Act and of the basic law governing the cost and value of such property. The injustice of this position, and the injustice of reporting such misleading information, is manifest when it is recognized that the attitude of the Commission results in its reporting as the "present value" of lands which the carrier has just

acquired, a sum which is one-third of the amount which the carrier was required to pay under the laws of eminent domain as the cost of acquisition of the property, which cost Congress has ordered to be reported, and which cost the Commission can report, since it is certainly capable of forming the same judgment which in fact the juries in the recent condemnation proceedings have just formed.

The foregoing considerations point conclusively to the fact that the ascertainment legally can be made, where the property has been recently acquired. Does a lapse of time between the date of its original acquisition and valuation date make impossible the legal ascertainment of its present cost of acquisition and damages or of purchase? Here again it is clear that the problem which the Commission declines to investigate is commonly investigated and solved by the courts and juries. The Commission refuses to comply with the Act because of the supposed chaotic condition of facts attendant upon the assumption of the obliteration of the railroad and the annihilation of the community development which has arisen because of the existence in the community of the railroad facility. But the making of this estimate of the cost of acquisition of lands which are now held and are now used for railroad purposes does not necessitate any such impractical process. If the problem were presented to a jury, the court would be impressed by no such difficulty in instructing the jury as to how it should proceed.

The Court would not in reliance upon the *Minnesota Rate Cases* come to the Commission's conclusion that because of the impossibility of indulging in these speculative hypotheses said to be referable to no criterion or standard of reason, the farmer would be restricted to the mere market value of the area taken, determined upon the basis of the acreage value of the adjoining farm, and with no consideration nor regard for the elements of value and the items of damage in excess of this meager amount. This exact problem is commonly presented to juries under instructions embodying the established principles of law, and decided by such juries, and no such theoretical or hypercritical objections are, or can be, directed to the procedure. In such cases, the amount which the land owner recovers is not, and lawfully cannot be, limited to the mere acreage value of the area taken, and the cost of acquisition which the railroads are paying is not lawfully confined to the partial cost which the Commission now reports and beyond which it finds it lawfully impossible to go. Such cases are of numerous varieties and are common in every court in the land. They are presented in the instance of railroads which have completed their construction upon the railroad lands in question, and which are now under operation, in such circumstances as these: It frequently occurs that the title to the land employed for right of way purposes is not secured in advance of the actual occupation of the property and the construction of the line thereon. The lands are

occupied by mere license or under adverse possession, and thereafter it is necessary to obtain the legal title in condemnation proceedings brought for that purpose. In other cases, a right is secured by leasehold or by license and the necessity subsequently arises after occupation and operation for the carrier to convert its leasehold or license into a fee. In other cases, a title is secured merely from a life tenant and it is necessary to condemn the rights of the remainderman. In other cases, where a title has been secured by the carrier from an owner, the holder of an outstanding mortgage forecloses the owner's title, and the carrier therefore must bring condemnation proceedings to perfect its title. Cases of the failure of title for any one of a great variety of possible defects and in which the carrier must again secure title by condemnation proceedings, are common in every state. In these cases the courts have not found themselves confronted with an insuperable problem, which prevents the owner of the land which is sought to be condemned, from securing the full protection of his legal rights and just compensation for the deprivation of his property and of every element of its value. The present cost of acquisition which Congress has ordered to be reported, is accurately and justly determined in accordance with the law. The law in such cases is merely an application of the general principles of the law of eminent domain to the problem at

hand. In this regard, attention is directed to the following authorities:

15 Cyc. 722–3.
Lewis, Eminent Domain (Third Edition) 705, and the cases cited.
Sutherland on Damages, Paragraph 1083.
Faulk vs. *Missouri River & N. W. Ry. Co.*, 132 N. W. 233 (S. D.)
County of Blue Earth vs. *St. P. & S. C. R. R. Co.*, 28 Minn., 503.

The cases heretofore cited indicate that the elements of the cost of acquisition are of two general classes, the acreage value of the land taken, and the damages due to severance and operation to the remainder of the owner's property. The Commission has reported the first element in its report of the so-called "value." The carrier does not dispute the accuracy or reasonableness of the sums reported. This partial determination is one of the elements upon which a jury under such circumstances would be required to make a determination. The carrier now insists that the process shall be completed. The Act so requires. As we have heretofore indicated, the position of the Commission, in that it bases its refusal upon an interpretation of the *Minnesota Rate Cases*, is clearly erroneous in that it involves a misconception of the doctrine of those cases and the proper scope of judicial precedent. In fact, the Court in the *Minnesota Rate Cases* manifestly implied after its criticism of the erroneous

legal assumptions upon which the testimony was based, that had there appeared the costs of condemnation determined in accordance with established legal principles those facts would have been worthy of consideration. It is not to be assumed, as the Commission does assume, that the determination of value or cost of the property, is to be conducted on a basis apart from the established principles governing the determination of the value of the identical property where the right of eminent domain is exercised. The following language from the *Minnesota Rate Cases* is significant: (230 U. S., 451):

> "It is urged that, in this view, the company would be bound to pay the 'railway value' of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation its *fair market value* for all its available uses and purposes. (*United States* vs. *Chandler-Dunbar Water Power Co.*, decided May 26, 1913.) If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. (*Boon Company* vs. *Patterson*, 98 U. S., 403; *Shoemaker* vs. *United States*, 147 U. S., 282; *United States* vs. *Chandler-Dunbar Co.*, *supra*.) *But still the inquiry would be as to*

the fair market value of the property, as to what the owner had lost, and not what the taker had gained. (*Boston Chamber of Commerce* vs. *Boston*, 217 U. S., 189, 195.) The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or of an increase over its fair market value, by reason of any added value supposed to result from its combination with tracts acquired from others so as to make it a part of a continuous railroad right of way held in one ownership. (*United States* vs. *Chandler-Dunbar Co., supra; Boston Chamber of Commerce* vs. *Boston, supra.*) *There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained.*" (Italics ours).

In the pending case, however, the Commission plants itself squarely upon the proposition that the testimony which would be properly received by a court in a case involving the identical problem which is before the Commission, would not be competent evidence of value. The amended petition of the carrier alleges (Record, page 35):

"Whatever may have been the difficulties inhering in or incident to the manner of

proof offered in said Texas Midland case, the relator says that no such difficulty exists with respect to the ascertainment of said present cost of condemnation and damages or of purchase in the relator's case, and that relator is prepared and has offered to establish definite competent proof respecting each parcel of land owned or used by it, in the following manner, to wit:

Relator accepts, as a basis for such ascertainment, the present market value of its lands as found and determined by the respondent, and assumes that each parcel of land, having reverted to adjoining owners as it would at common law upon its abandonment, would be re-acquired by the relator by purchase or condemnation during the theoretical reconstruction period. Relator will prove such cost of purchase or condemnation by the testimony of competent expert witnesses familiar with each parcel of property, having knowledge of its value, and thoroughly experienced in the acquisition of private property for public use by purchase or condemnation. Where an entire parcel is thus acquired the cost of its acquisition will be its market value as determined by the respondent as aforesaid, plus certain incidental costs, such as court costs, and the like; where a part only of an entire parcel is taken the cost of acquisition will be the market value of the part taken as determined by

the respondent as aforesaid, plus the damage to the residue of the tract, the market value of which would also be as determined by the respondent, plus the incidental costs as aforesaid."

The Commission in its answer (Record, page 26) denies that the evidence thus tendered is competent proof of the present cost of condemnation and damages or of purchase. We submit that this position is conclusively wrong.

Respectfully submitted,

W. G. BRANTLEY,
SANFORD ROBINSON,
LESLIE CRAVEN.

December 8, 1919.

No. 418.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA, AT THE RELATION OF KANSAS CITY SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
For Defendant in Error.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1919

SUBJECT INDEX.

	Page
STATEMENT	1
ARGUMENT:	
To estimate the present cost of condemnation and damages or of purchase of lands included in appellant's railroad is impossible, because it necessarily involves unwarrantable and unlawful assumptions	4
The word estimate is erroneously applied to an opinion expressed which has no reasonable foundation upon which to rest	11
The court will not, by issuing a writ of mandamus, require something to be done which it is impossible to do	12
The meaning of paragraph entitled "Second" of the valuation act is not entirely clear	13
The decision of this court in *The Minnesota Rate cases* is directly in point and should be given controlling influence	14
This court has approved the Commission's interpretation of the court's decision in *The Minnesota Rate cases*	18
Appellant's contention that the Commission may properly base estimates of present cost of condemnation and damages or of purchase upon the present market value of the lands involved, as estimated by the Commission, is unsound	21
Appellant's contention that it will lose something to which it is entitled, unless the remedy it asks for is applied, is based upon speculation, and is not justified by the facts	22
Appellant is asking the court to assist it in obtaining for its common-carrier lands a special railway value, in excess of the amount invested in them and beyond the value of similar property owned by others	26
Appellant misconstrues the paragraph of the valuation act with which it is asking the court to compel the Commission to comply	29
The Real Difficulty	33

TABLE OF CASES CITED.

	Page
Ann Arbor R. Co. v. *Fellows et al.*, 236 Fed. 387	17–18
Chicago & North Western Railway Company v. *Smith*, 210 Fed. 632	15, 16–17
City and County of Denver v. *Denver Union Water Co.*, 246 U. S. 178	18–19, 20
In the Matter of the Valuation of the Property of the Kansas City Southern Railway Co. et al., 1 I. C. C. Val. Rep	1, 3
Louisville & Nashville R. Co. v. *Railroad Commission of Alabama*, 208 Fed. 35	17
Silsby Manufacturing Co. v. *City of Allentown*, 26 Atl. 646	13
Smyth v. *Ames*, 169 U. S. 466	23, 24
Texas Midland Railroad Valuation Case, 1 I. C. C. Val. Rep. 1	3, 18, 19, 20
The Minnesota Rate cases, 230 U. S. 352	2, 4–9, 10, 12, 14, 15, 16, 17, 18, 20, 22, 27–29, 30–31, 34

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA, AT THE RELATION OF KANSAS CITY SOUTHERN RAILWAY COMPANY, ~~appellant~~,
v.
INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, ~~appellee.~~
} No. 413.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

Plaintiff in Error, hereinafter called appellant, a common carrier subject to the act to regulate commerce, requests the court to issue a writ of mandamus commanding defendant in error, hereinafter called the Commission, to receive certain evidence which it has refused to receive in a proceeding now pending before it, entitled *In the Matter of the Valuation of the Property of the Kansas City Southern Railway Company et al.*

By section 19a of said act, commonly called the valuation act of March 1, 1913, the Commission is

required, among other things, to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to" the act to regulate commerce, and paragraph entitled "Second" of the valuation act reads:

> Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

To the extent the commission is required by said paragraph to ascertain and report separately the "present cost of condemnation and damages or of purchase in excess of original cost or present value" of the lands included in the rights of way, yards, and terminals of common carriers, it has never been able to comply therewith. It has, however, permitted appellant and other carriers, including the Texas Midland Railroad, to introduce in proceedings before it a large volume of evidence, the effect of which was to prove what had previously been demonstrated by this court in its decision in *the Minnesota rate cases* (230 U. S. 352) namely, that it is impossible to comply with this requirement of the valuation act, because no

lawful or reasonable basis upon which to rest an estimate of such cost can be discovered.

After the commission had rendered its decision in the *Texas Midland case* (1 I. C. C. Val. Rep. 1), in which evidence of the character mentioned had been submitted to it for consideration, appellant asked for and was given permission to introduce in the *Kansas City Southern case* before an examiner of the commission at Kansas City evidence which appellant claimed would tend to establish the present cost of condemnation and damages or of purchase of the lands included in the rights of way, yards, and terminals of the railroad used by appellant as a common carrier in serving the general public. At the hearing before said examiner, appellant introduced such evidence to the extent that it was then prepared to do so, all of which was received by the examiner. Thereafter, however, appellant asked the commission to permit it to introduce additional evidence of the same character and this request was denied for the reason stated by the commission in its decision in said *Texas Midland case,* whereupon appellant brought this action and asked for a writ of mandamus as above stated.

In the Supreme Court of the District of Columbia appellant filed a demurrer to the answer of the Commission, which was overruled, and upon appeal the ruling of the Supreme Court was affirmed by the Court of Appeals. From these rulings appellant appeals to this court.

ARGUMENT.

I.

To estimate the present cost of condemnation and damages or of purchase of lands included in appellant's railroad is impossible, because it necessarily involves unwarrantable and unlawful assumptions.

The valuation act was approved by the President and became effective on March 1, 1913. At that time there were pending in this court, on appeal from the Circuit Court for the District of Minnesota, *The Minnesota Rate cases* above mentioned, wherein an attempt had been made to estimate the present cost of acquiring the lands included in the rights of way, yards, and terminals of certain common-carrier railroads. To this method of procedure, which this court characterized as an attempt to apply the cost-of-reproduction method in determining the value of said lands (id. 450), and to the result thereof the appellants excepted, and in stating and sustaining the exception this court, speaking through Mr. Justice Hughes, said:

> It is contended that the valuation was made upon a wrong theory; that it is a speculative estimate of "cost of reproduction"; that it is largely in excess of the market value of adjacent or similarly situated property; that it does not represent the present value, in any true sense, but constitutes a conjecture as to the amount which the railway company would have to pay to acquire its right of way, yards, and terminals, on an assumption, it-

self inadmissible, that, while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the State, and the location, population, and activities of towns, villages, and cities, were as they are now. (Id. p. 444.)

* * * * *

* * * It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it can not be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market values of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights and it can not be sup-

posed that they would be disregarded. (Id. 450–451.)

* * * * *

Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right of way, if the railroad were not there, is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry, and trade. Communities have long been dependent upon its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. * * * (Id. ~~542.~~ 452)

* * * *

The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right of way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right of way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a "reproduction" were considered, The railroad right of way was conceived to be a property *sui generis,* "a large *body of land in a continuous ownership,*" representing one of the "highest uses" of property and possessing an exceptional value. The estimates before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the "railway value" of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided.

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That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. * * * (Id. 453.)

* * * * *

Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, can not properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right of way, yards, and terminals upon the so-called "railway value" of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar lands in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calcu-

> lated on that value, which were embraced in the items of " engineering, superintendence, legal expenses," " contingencies " and " interest during construction." (Id. 455.)

It will be observed that this court entertained the opinion that an estimate of the present cost of acquisition of the lands included in the right of way, yards, and terminals of a carrier could be made only upon the theory that the railroad of the carrier would be removed before the estimate would be made, and it is apparent that no other theory would be tenable. The court points out that upon the assumption of the nonexistence of the railroad it is impossible for anyone to describe either the conditions that would exist or the exigencies of the hypothetical owners of the property, and says in emphatic language that an attempt to estimate what would be the actual cost of acquiring the right of way under such circumstances would be to indulge in mere speculation. In other words, this court says that what appellant is asking the court to require the Commission to do can not, as a matter of law, be done. The court, however, does not stop here. It proceeds to demonstrate why such an estimate can not be made. It shows that the uses and values of lands in the vicinity of the railroad are largely the result of the construction and operation of the railroad; that it would be impossible to determine the extent to which such uses and values have been so influenced, and that to assume that they would not be affected if the railroad were removed, and

base upon that theory an estimate of reacquiring the lands, or its equivalent, an estimate of the present cost of condemnation and damages, or of purchase, would be improper and unjustifiable and produce a result which could not be accepted as evidence by a court. This court clearly states, in substance, that the estimate of present cost of condemnation and damages, or of purchase which appellant is asking the court to compel the Commission to make is an estimate which is wholly beyond reach of any process of rational determination. In this connection it points out that the appraisers of the lands involved in *The Minnesota Rate cases,* in an attempt to estimate the cost of acquiring the lands, were presented with an impossible hypothesis.

As shown in the answer herein, the evidence introduced before the Commission in connection with the valuation of the lands included in appellant's railroad establishes that at the time the railroad was constructed a portion of said lands was donated to, and another portion purchased by, appellant, and that appellant obtained title to still another portion through condemnation proceedings. It is evident that, upon the assumption of the removal of the railroad and its reproduction, it is impossible to ascertain the portion of said lands which would be so donated, or the portion thereof which would have to be purchased by appellant, or the portion thereof appellant would have to acquire title to through condemnation proceedings.

It is further apparent that the removal of the railroad and its immediate reproduction would not damage in any manner or to any extent any of the lands adjoining or adjacent to the railroad or the owners of such adjoining or adjacent lands.

It is also clear that to determine, upon the assumption of the removal of the railroad, that the title to the lands included therein would revert to or be vested in the owners of said adjoining lands, would be unjustifiable and improper. In this connection the Commission states, by way of illustration, that chapter 8 of article 6532 of the Statute Laws of the State of Texas, which is the law in force at the present time in that State, provides as follows:

> The right of way secured or to be secured to any railway company in this State, in the manner provided by law, shall not be so construed as to include the fee simple estate in lands either public or private, nor shall the same be lost by the forfeiture or expiration of the charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation.

II.

The word estimate is erroneously applied to an opinion expressed which has no reasonable foundation upon which to rest.

It is said the contention that it is impossible to estimate the present cost of condemnation and

damages or of purchase is unsound; that such estimates have been made in the past, and that what has been done once may be done again. This court, however, has demonstrated in *The Minnesota Rate cases, supra,* that the so-called estimates were not estimates in fact within a proper definition of that term, because they had no reasonable foundation upon which to rest. It expressed the view that before such an estimate could be made the railroad, in imagination at least, must be removed, and pointed out the unreasonableness of assuming that if such removal should take place no changes in the values now existing would result. In this connection it said: "It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed?" (Id. 451.)

III.

The court will not, by issuing a writ of mandamus, require something to be done which it is impossible to do.

It is further contended that the language in said paragraph entitled "Second" of the valuation act shows that Congress intended to require the Commission to ascertain and report separately the present cost of condemnation and damages or of purchase, and that for this reason it must attempt to do so. In this connection, however, we do not deem it necessary to make a lengthy argument because a

well-known maxim is that the law never requires the impossible.

In *Silsby Manufacturing Company* v. *City of Allentown* (26 Atl. 646) it was held that "The requirement that proposals to furnish a city with materials needed shall be advertised for need not be complied with where the thing needed is part of a patented article which can be bought at only one place." In support of this holding the court said: "The law does not insist on what is impossible or absolutely useless."

If the court reaches the conclusion that on account of matters herein set forth it would be impossible to discover any lawful or reasonable basis upon which to rest an estimate of the present cost of condemnation and damages or of purchase of the lands included in appellant's railroad it will not issue a writ of mandamus in accordance with appellant's request.

IV.

The meaning of paragraph entitled "Second" of the valuation act is not entirely clear.

Thus far we have been discussing matters herein upon the assumption that the meaning of paragraph entitled "Second" of the valuation act is clear, but we are obliged to admit that this might reasonably be regarded as a violent assumption.

It has been said that the latter portion of this paragraph calls for the original and present costs of acquisition, exclusive of the value of the land

taken at the time of its acquisition by the carrier; but, on the other hand, it has been argued that the acquisition costs called for include the value of the land taken.

It is also contended that in its language in *The Minnesota Rate cases* above quoted this court was speaking of the present cost of acquisition, including the value of the land taken, and not of the present cost of acquisition exclusive of such value.

According to our view, however, these differences as to interpretation are of no importance whatever. The matter of consequence in this connection is that this court expressed the view that an estimate of the present cost of acquisition could be made only by indulging in mere speculation, and, with this as a premise, held that an estimate so made could not properly be used in determining the fair present value of the carrier's lands.

V.

The decision of this Court in The Minnesota Rate cases is directly in point and should be given controlling influence.

Notwithstanding the plain language used by this court in its decision in *The Minnesota Rate cases,* it has been contended that the decision has no application in a case of this kind, because it was rendered in a case where the fair average of the normal market value of lands similar to the lands included in the

rights of way, yards, and terminals of the carriers had not been shown.

In some instances this argument would perhaps have force, but in this instance there is no necessity for resorting to inference in order to determine what the court intended to, and did, decide. As above shown, in advance of announcing its decision, the court stated the question it intended to decide, and then decided that question in plain and unambiguous language. Also it will be seen that the court represented that question to be the substantial question presented for determination, which, of course, it was.

A contention exactly like the contention of counsel for the carriers, above mentioned, was made in the case of *Chicago & North Western Railway Company* v. *Smith* (210 Fed. 632), decided on January 20, 1914. Up to the time of final hearing in the *Chicago & North Western case,* both parties—that is, the State of South Dakota and representatives of the carrier—had proceeded upon the theory that it was proper to attempt to estimate the present cost of acquisition of the carrier's lands and use that estimate in determining the fair present value of the lands, but on final hearing the State objected to the estimate and such use thereof upon the ground that the decision of this court in the *Minnesota Rate cases* had shown the making and use of the estimate to be improper. In sustaining the contention of the State in this regard, the court,

speaking through District Judge Willard, and after reviewing the pertinent evidence, said:

> From this evidence the company argues that it is unfair to say that for a strip of land 100 feet wide through the middle of a 160-acre farm it should be allowed no more as the cost of reproducing it than the price per acre if the whole farm were to be bought; that it is a matter of common knowledge that, if a private individual wanted to buy such a strip, it would cost him much more per acre than the value per acre of the whole farm.
>
> It is true that the evidence in this case does differ from that in the *Minnesota Rate cases,* and there is much force in the company's argument. But the defendant's claim in this respect is disposed of by what the Supreme Court, in the *Minnesota Rate cases* (230 U. S. on page 455, 33 Sup. Ct. on page 763, 57 L. Ed. 1511), said:
>
> "The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items

> of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'"
>
> I, accordingly, adopt the valuation placed upon these lands by the State before any multiplier is used, * * *. (Id. 639.)

In pointing out the difference concerning evidence of market value in the *Minnesota Rate cases* on the one hand as compared with the Chicago & North Western case on the other, statements of District Judge Willard were as follows:

> * * * Nowhere in that case did the market value of contiguous lands appear. That does appear in this case, both in the evidence of the State and in that of the company. (Id. 638.)

To the same effect see *L. & N. R. Co.* v. *Railroad Commission of Alabama* (208 Fed. 35, 42–44) and *Ann Arbor R. Co.* v. *Fellows et al.* (236 Fed. 387, 392). In the latter case, the court, speaking through Sessions, district judge, said:

> * * * The valuation placed upon the right of way and station grounds, exclusive of all improvements thereon, is $397,104, to which sum has been added more than 14 per cent thereof for so-called "overheads." This basic valuation has been reached by applying to the right of way without improvements the estimated values of adjacent lands, including all buildings and other improvements. It is sufficient to say that this method of computing values and the practice of add-

> ing "overheads" to actual values are contrary to the letter and the spirit of the rule laid down by the Supreme Court in the Minnesota Rate cases (230 U. S., 352) * * *.

In its decision in the *Texas Midland case*, supra, the Commission shows several instances where State authorities have placed a like interpretation upon the decision of this Court in *The Minnesota Rate cases* and have refused to apply the cost-of-reproduction method in determining the value of lands used by common-carrier corporations in serving the general public. (Id. 61.)

VI.

This Court has approved the Commission's interpretation of the Court's decision in the Minnesota Rate cases.

In the case of *City and County of Denver* v. *The Denver Union Water Company* (246 U. S. 178), this court had occasion to, and did, pass upon and approve an interpretation of its decision in *The Minnesota Rate cases* which had been made by a special master and approved by the District Court for the District of Colorado. In this connection the master said:

> The measure of value of lands adopted in considering the evidence is the present normal market value of similar lands in the same locality. (*Minnesota Rate cases*, 230 U. S. 352, at 449–456.) It follows from this rule that the original cost of the lands is not

necessarily the controlling factor, though such original cost has been considered along with all the other evidence in determining the value. It likewise follows from this measure of value that when the present normal market value of similar lands in the same locality has been determined, nothing can be added to such value on account of the actual or estimated consequential or severance damages—if any—paid by the water company when it originally acquired its lands or on account of the company's actual or estimated overhead expenses in connection with the purchase of these lands. These expenses represent original costs of the lands and not their present market value. In considering the evidence concerning the value of these lands I have assumed that we may take into consideration their adaptability or availability for any useful purpose, provided the evidence shows that lands possessing such adaptability or availability have any special market value on account thereof; but the final question, in my judgment, always is, What is the present market value of similar lands in the same locality, and not what are these lands worth now to the water company for the purposes for which they are now used? (*Texas Midland case*, supra, p. 60.)

After reviewing several matters involved in the case, this court, speaking through Mr. Justice Pitney, announced its conclusion concerning the special master's aforesaid interpretation of its de-

cision in *The Minnesota Rate cases.* In this connection the court said:

> What we have said establishes the propriety of estimating complainant's property on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures. (Id. 191.)

The method of procedure adopted and followed by the Commission in determining the present value of lands included in the rights of way, yards, and terminals of common carriers is described by it in its decision in said *Texas Midland case* as follows:

> Present value * * * is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier and multiplying this acreage by a market value determined from the present market value of similar adjacent and adjoining lands. Due allowance is made for any peculiar value which may attach by reason of the peculiar adaptability of the land to railroad use.
>
> Nothing is included for the expense of acquisition, nor for severance damages, nor for interest during construction. (Id. 53.)

It will be observed that the Commission is acting in accordance with the decision of this court in *The Minnesota Rate cases* as interpreted by the court itself in the *Denver Union Water Company case,* and if the Commission should act instead in accordance with the method of procedure appellant is asking this court to compel it to pursue it would com-

mit thereby an error of law. If the Commission should make estimates of the present cost of condemnation and damages or of purchase of appellant's common-carrier lands, notwithstanding that no reasonable or lawful basis upon which to rest such estimates can be discovered, and then consider and give weight to the estimates in determining the value of appellant's property for rate-making purposes it would necessarily result that the value thus fixed could not be sustained in court.

VII.

Appellant's contention that the Commission may properly base estimates of present cost of condemnation and damages or of purchase upon the present market value of the lands involved, as estimated by the Commission, is unsound.

Appellant says it has accepted the estimate of the present market value of its lands made by the Commission, and that therefore the Commission, using this estimate as a basis, can easily find the present cost of condemnation and damages or of purchase. The unsoundness of this proposition, however, is readily observable. In finding the present market value of appellant's common-carrier lands, as measured by the "fair average of the normal market value of lands in the vicinity having a similar character", the Commission must of course consider conditions as they now are, including the existence of the railroad, but in estimating what it would cost to reacquire such lands, that is, the re-

production cost, or the present cost of condemnation and damages or of purchase, of the lands, the Commission would have to treat the railroad as nonexistent and speculate, enter into the realm of mere conjecture, as to what the market value of the lands would be under such circumstances. This is necessarily true, first, because it is impossible to reproduce a thing which is in existence, and second, because it would be improper for the Commission to assume the nonexistence of the railroad and "at the same time that the values that rest upon it remain unchanged", as stated by this court, as above shown, in the *Minnesota Rate cases*. It is also true, as stated by this court in said cases, that an attempt to estimate what would be the conditions of ownership of said lands or the exigencies of the hypothetical owners thereof, upon the assumption that the railroad were removed, would be an attempt to accomplish the impossible.

VIII.

Appellant's contention that it will lose something to which it is entitled, unless the remedy it asks for is applied, is based upon speculation, and is not justified by the facts.

For the purpose, evidently, of indicating that its rights have not been properly protected appellant avers that it paid $180,000 for lands the present market value of which as estimated by the Commission is only $60,000, and that the cost of reproducing its lands and those of its associated companies

would be more than twice as much as the sum the Commission has included as their present value in its tentative valuation. When we compare these averments with appellant's assertion that it has accepted the present market value of its lands as estimated by the Commission, it is apparent that the injury appellant is talking about is based upon its belief that when the commission fixes the ultimate value of its properties for rate-making purposes, or for some other purpose, it will include therein as the value of appellant's lands only their present value, as measured by the fair average of the normal market value of similar lands in the same vicinity. This belief, however, is necessarily based upon speculation, and is not justified by the facts, because it is simply appellant's conjecture concerning action to be taken by the Commission, if taken at all, in the future. Up to the present time the Commission has not fixed for any purpose the ultimate value of appellant's common-carrier property, or the ultimate value of any other common-carrier property, and when it does so it will of course have to consider and give proper weight to, not only the present value of the lands as measured by the fair average of the normal market value of lands in the vicinity having a similar character, but also the amount of money paid by the carrier for the lands and all other pertinent facts and circumstances. In *Smyth* v. *Ames,* 169 U. S. 466, in announcing its conclusion concerning the matters to be considered

in fixing an ultimate value for rate-making purposes this court, speaking through Mr. Justice Harlan, said:

> We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the orginal cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. * * * (Id. 546–547.)

Appellant does not aver, and it could not truthfully aver, that the Commission has refused to permit it to show the amount of the investment made in its common-carrier lands when they were acquired and dedicated to the service of the public, and while it avers that it paid $180,000 for lands the present market value of which was estimated by the Commission as only $60,000, it carefully refrains from comparing the total investment made in all its common carrier lands with their present value, as measured by the fair average of the normal market value

of lands in the vicinity having a similar character. If in the future the Commission fixes, for a particular purpose, the ultimate value of appellant's common-carrier properties and includes therein as the value of its lands less than the amount invested in the lands at the time they were acquired and dedicated to the service of the public, appellant will be free to challenge the validity of the Commission's action, but we respectfuly submit that until that time arrives it will have no standing in court in a case like the one now under consideration.

In its brief in this case in the Court of Appeals appellant said: "Neither the effect of the land reproduction schedule when once ascertained nor the use to be made of it, can be considerd by the court in this proceeding."

If these assertions of appellant are correct it necessarily follows, we submit, that the court can not comply with appellant's request for a writ of mandamus; because, if appellant is unable to show that it will sustain a legal injury if the writ is not issued, it can not establish its right thereto, and it goes without saying that unless the court may consider the effect of the land reproduction schedule and the use to be made thereof, it can not determine whether such an injury will result from the Commission's refusal to receive and consider the evidence, so-called, which is in question here.

IX.

Appellant is asking the Court to assist it in obtaining for its common-carrier lands a special railway value, in excess of the amount invested in them and beyond the value of similar property owned by others.

Notwithstanding its admission that the Commission has correctly estimated the present value of its common-carrier lands, as measured by the fair average of the normal market value of similar lands in the same vicinity, and without attempting to show that this value is less than the amount of money invested in the lands when they were acquired and dedicated to the service of the public, appellant is trying to induce the court to assist it in securing a greater value by compelling the Commission to use, in valuing the lands, what is known as the cost-of-reproduction method. The mental route traveled by the Commission in reaching conclusions concerning values of lands is the same regardless of the purpose for which the lands are used, but while appellant is contending that the Commission should use the cost-of-reproduction method in valuing its common-carrier lands it does not advance a like claim concerning lands owned by it and used for purposes other than those of a common carrier. This means, if it means anything, that appellant is contending it is entitled to a special railway value, that is, a value of its common-carrier lands in excess of the amount invested in them and beyond the value of similar property

owned by others, solely by reason of the fact that they are used in the public service.

In this regard the method of procedure appellant is endeavoring to compel the Commission to adopt and follow is exactly like the procedure of the Circuit Court, which was condemned by this court, in the *Minnesota Rate cases, supra,* where pertinent language of the court was as follows:

> The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the Master were in substance appraisals of what was considered to be the peculiar value of the railroad right-of-way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right-of-way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a "reproduction" were considered. The railroad right-of-way was conceived to be a property *sui generis,* "a large body of land in a continuous ownership," representing one of the " highest uses " of property

and possessing an exceptional value. The estimates before us, as approved by the Master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the "railway value" of the land; * * *.

* * * * *

* * *. And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right.

The increase sought for "railway value" in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which can not be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the

activities of the community. For an allowance of this character there is no warrant. (Id. 453, 454-455.)

X.

Appellant misconstrues the paragraph of the Valuation Act with which it is asking the Court to compel the Commission to comply.

Appellant's brief in this case in the Court of Appeals contains a paragraph which reads: "That certain of relator's lands were acquired by donation presents no difficulty in the way of ascertaining their present cost of condemnation and damages or of purchase." In support of this conclusion appellant pointed out that, as to structures, the Commission estimates the cost of reproduction regardless of the fact that some of them were donated to the carriers originally, and then said: "But two questions are presented; first, what lands, rights of way and terminals did the relator own or use for the purpose of common carrier, and secondly, what is the present cost of condemnation and damages or of purchase of those lands? The provision is not ambiguous. There is no room for speculation or conjecture as to what lands are involved, because the requirement of the statute operates upon *all* lands, whether originally acquired by purchase or condemnation, or gift or by operation of the statute of limitations or in any other conceivable manner."

It is true that the Commission estimates the cost of reproducing common-carrier structures, but this can be done, because the market prices to be paid for the materials which enter into the structures do not depend upon the places in which the structures are to be located or upon the circumstances and conditions surrounding such places. In attempting to estimate the cost of reproducing common-carrier lands, however, the estimator is immediately confronted with difficulties which are insurmountable. Of course the lands could not be reproduced, and in order to estimate what it would cost to reacquire them it would be necessary to know what the conditions of their ownership and the exigencies of their owners would be if the railroad were not there, and, as stated by this court in the *Minnesota Rate cases, supra,* neither of said elements is capable of rational ascertainment. The pertinent language of the court was:

> * * *. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? * * *. (Id. 451.)
>
> * * *. The assumption of its non-existence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right-of-way, supposing the

railroad to be removed, are wholly beyond reach of any process of rational determination. * * *. (Id. 452.)

But even if it could overcome these difficulties, the Commission would still find it impossible to make the estimates in question. It will be observed that in and by the first part of said paragraph entitled "Second" the Commission is required to find the original cost and present value of common-carrier lands, and that having done this it is required by the latter portion of the paragraph to state in detail the present cost "of condemnation and damages or of purchase in excess of such original cost or present value." This is not a call for the present costs of acquisition in the aggregate; it is instead a call for the present costs of condemnation and damages in one sum and the present costs of purchase in another sum, and in order to determine either of said sums it would be necessary to know how much of the land would be donated to the carrier, how much it would have to purchase, and the portion thereof it would have to acquire through condemnation proceedings. To the extent that donations were made it would be unnecessary for the carrier to prosecute condemnation proceedings and make purchases, and no one will claim that, especially where the sum paid for the land itself is not included, the cost of acquiring it by purchase is as great as, or even approximates, the cost of obtaining title to it through condemnation proceedings.

It is a matter of common knowledge that when the railroads of this country were constructed a very large portion of the lands included in the rights of way, yards and terminals thereof was donated to the carriers, and that only a comparatively small portion of said lands was acquired by the carriers through condemnation proceedings. Under these circumstances, and for the reason that if a person were compelled to speculate as to what would happen in the future he would naturally resort to a study of what had happened in the past, we think appellant's contentions that, for the purpose of estimating the cost of reproducing the railroads, it would be proper and lawful to assume that, at the time of reproduction, the lands included therein would be worth as much per acre as they are at the present time; that they would be owned by parties other than the carriers, and that the latter would have to obtain title to them in every instance through condemnation proceedings prosecuted against such owners, are clearly unsound.

The speculative costs appellant is endeavoring to secure the advantage of are costs it never did incur and never will, because no stretch of the imagination is sufficient to justify the conclusion that such costs can ever be incurred by anybody. Nevertheless, appellant insists that unless it is accorded such an advantage, and the Commission is compelled to make the estimates in question and use them in valuing appellant's property, its rights under the Constitution of the United States will be violated.

On the contrary, however, we respectfully submit that such an advantage could not be accorded to the appellant and other common-carriers without depriving those who pay for common-carrier services of the right to have the charges therefor based upon the fair value of the property used by the carriers in performing the services. In other words, the advantage appellant is contending for would, if granted, constitute a legal and unconscionable injury to the general public.

XI.

The real difficulty.

In said brief in the Court of Appeals, under the heading of "The Real Difficulty," appellant indulged in considerable speculation concerning the reasons which prompted the Commission to deny it the advantage it is endeavoring to obtain, and expressed the view that one reason for such denial was the conviction of the Commission that, in requiring it to ascertain and report separately the "present cost of condemnation and damages or of purchase" of common-carrier lands, Congress acted unwisely.

Of course the Commission repudiates the intimation that it has in this case based, or that it ever bases, action taken by it upon its opinion concerning the wisdom of Congress as manifested by the provisions of any law it may enact.

In this connection, however, the Commission states: That the valuation act was passed on March

1, 1913; that the decision of this court in the *Minnesota Rate cases* was handed down and made public on June 9, 1913; that prior to said June 9 the lower courts and some of the state commissions had proceeded upon the theory that it was proper to attempt to apply the cost-of-reproduction method in determining the present value of common-carrier lands, and that while said theory was being advanced and acted upon favorably, and before the unsoundness of that theory had been demonstrated by this court, Congress inserted in said act the requirement here in question.

Under these circumstances it seems reasonable to believe, and the Commission does believe, that if the publication of said decision had preceded the passage of the valuation act said requirement would never have existed, because it feels certain Congress would have endeavored to act in accordance with the principles of law as announced by the court of last resort.

The action of the Commission complained of by appellant, however, is not based upon this belief, but is based instead upon the Commission's conviction that compliance with said requirement is, as a matter of law, impossible.

For the reasons above set forth we respectfully submit that the appeal in this case should be dismissed.

P. J. FARRELL,
For Defendant in Error.

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or the difficulties involved in so doing, and that a railroad company whose interests were affected was entitled to the writ of mandamus. P. 187.

Reversed.

THE case is stated in the opinion.

Mr. Louis Marshall and *Mr. Samuel W. Moore*, with whom *Mr. Samuel Untermyer* was on the brief, for plaintiff in error.

Mr. P. J. Farrell for defendant in error:

To estimate the present cost of condemnation and damages or of purchase of lands included in plaintiff in error's railroad is impossible, because it necessarily involves unwarrantable and unlawful assumptions.

In the *Minnesota Rate Cases*, 230 U. S. 352, this court entertained the opinion that an estimate of the present cost of acquisition of the lands included in the right of way, yards, and terminals of a carrier could be made only upon the theory that the railroad would be removed before the estimate would be made, and it is apparent that no other theory would be tenable. The court points out that upon the assumption of the nonexistence of the railroad it is impossible for anyone to describe either the conditions that would exist or the exigencies of the hypothetical owners of the property, and says in emphatic language that an attempt to estimate what would be the actual cost of acquiring the right of way under such circumstances would be to indulge in mere speculation. In other words, this court says that what plaintiff in error is asking the court to require the Commission to do cannot, as a matter of law, be done. The court, however, does not stop here. It proceeds to demonstrate why such an estimate cannot be made. It shows that the uses and values of lands in the vicinity of the railroad are largely the result of the construction and operation of the railroad; that it would be

impossible to determine the extent to which such uses and values have been so influenced, and that to assume that they would not be affected if the railroad were removed, and base upon that theory an estimate of reacquiring the lands, or its equivalent, an estimate of the present cost of condemnation and damages, or of purchase, would be improper and unjustifiable and produce a result which could not be accepted as evidence by a court. This court clearly states, in substance, that the estimate of present cost of condemnation and damages, or of purchase, which plaintiff in error is asking the court to compel the Commission to make is an estimate which is wholly beyond reach of any process of rational determination. In this connection it points out that the appraisers of the lands involved in the *Minnesota Rate Cases*, in an attempt to estimate the cost of acquiring the lands, were presented with an impossible hypothesis.

As shown in the answer herein, the evidence introduced before the Commission in connection with the valuation of the lands included in plaintiff in error's railroad establishes that at the time the railroad was constructed a portion of said lands was donated to, and another portion purchased by, plaintiff in error, and that plaintiff in error obtained title to still another portion through condemnation proceedings. It is evident that, upon the assumption of the removal of the railroad and its reproduction, it is impossible to ascertain the portion of said lands which would be so donated, or the portion thereof which would have to be purchased by plaintiff in error, or the portion thereof plaintiff in error would have to acquire title to through condemnation proceedings.

It is further apparent that the removal of the railroad and its immediate reproduction would not damage in any manner or to any extent any of the lands adjoining or adjacent to the railroad or the owners of such adjoining or adjacent lands.

It is also clear that to determine, upon the assumption of the removal of the railroad, that the title to the lands included therein would revert to or be vested in the owners of said adjoining lands, would be unjustifiable and improper.

The court will not, by issuing a writ of mandamus, require something to be done which it is impossible to do. *Silsby Mfg. Co.* v. *Allentown*, 153 Pa. St. 319.

The decision of this court in the *Minnesota Rate Cases* is directly in point and should be given controlling influence. *Chicago & Northwestern Ry. Co.* v. *Smith*, 210 Fed. Rep. 632; *Louisville & Nashville R. R. Co.* v. *Railroad Commission*, 208 Fed. Rep. 35; *Ann Arbor R. R. Co.* v. *Fellows*, 236 Fed. Rep. 387.

This court has approved the Commission's interpretation of the court's decision in the *Minnesota Rate Cases*. See *Denver* v. *Denver Union Water Co.*, 246 U. S. 178.

In finding the present market value of plaintiff in error's common-carrier lands, as measured by the "fair average of the normal market value of lands in the vicinity having a similar character," the Commission must of course consider conditions as they now are, including the existence of the railroad, but in estimating what it would cost to reacquire such lands, that is, the reproduction cost, or the present cost of condemnation and damages or of purchase, of the lands, the Commission would have to treat the railroad as nonexistent and speculate, enter into the realm of mere conjecture, as to what the market value of the lands would be under such circumstances.

Plaintiff in error's contention that it will lose something to which it is entitled, unless the remedy it asks for is applied, is based upon speculation, and is not justified by the facts. It is asking the court to assist it in obtaining for its common-carrier lands a special railway value, in excess of the amount invested in them and beyond the value of similar property owned by others.